The basis of the jurisdiction is O 25 r 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

and

A declaratory order will eliminate anxiety of having to live under a cloud of fear. In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy...

In the same case, the learned Chief Justice also said at p 108:

In *Ruislip-Northwood UDC* v *Lee* plaintiff sought the ruling of the court on a definite, concrete and existing dispute. The fact that the declaration was sought before the statutory powers were exercised was not a consideration weighing against the grant of that declaration. Nowadays, the courts seldom refuse to make orders on grounds that it is premature to consider the question. As Greer LJ pointed out that it had been for years the practice to know and determine claims for declaration of rights where there was a real and not a fictitious or academic question involved in order that the parties might know what course to take without running the risk of finding themselves liable to damages. Indeed, we consider that a court should make it possible to settle real disputes immediately they arise, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future.

Applying the above principles, we would allow this appeal with costs by granting the declaration sought, and under s 417 we order the Land Administrator (the first respondent) to cancel the caveat within one week from today. We also order that the deposit be refunded to the appellant.

Appeal allowed.

Solicitors: *Azman Davidson & Co; Shean Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Dato' Mat

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-134-90
ABDUL HAMID LP, AJAIB SINGH SCJ AND WAN YAHYA J
18 MARCH 1991

Criminal Procedure — Bail — Bail offered on condition of surrender of passport — Application to High Court to vary condition — Power of High Court to vary condition — Criminal Procedure Code (FMS Cap 6), ss 388, 389, 394 & 418A

The respondent had been charged for criminal breach of trust and had been offered bail in the sum of $400,000 in two sureties and on condition he surrenders his international passport to the court. The case was transferred to the High Court. The respondent applied for an order for the release of his international passport to enable him to make a business trip to Indonesia. The learned judge of the High Court varied the condition imposed and ordered the international passport to be returned to the respondent for a specific period. See [1991] 2 MLJ 125. The public prosecutor appealed against the order.

Held, dismissing the appeal:

(1) It is not illegal to impose fair and reasonable conditions and in particular the condition requiring the accused to surrender his passport, apropos to the securing of the accused's subsequent attendance in court.

(2) In the present case in view of the order made for the transfer of the case from the sessions courts to the High Court, the learned judge of the High Court was acting well within his jurisdiction to review the condition of bail as if the same was made by him.

(3) In any event, in the absence of any express provision in the Criminal Procedure Code to the contrary, a judge of the High Court may by virtue of s 4 of the Code exercise his revisionary powers under the Courts of Judicature Act 1964.

[Bahasa Malaysia summary

Di dalam kes ini responden yang telah dituduh dengan kesalahan pecah amanah jenayah telah diberi jaminan $400,000 dengan dua penjamin dan dengan syarat ia menyerahkan paspot antarabangsanya kepada mahkamah. Kes itu telah diperintahkan dipindakan kepada Mahkamah Tinggi. Responden telah memohon pasport antarabangsanya diberi balik kepadanya untuk membolehkannya membuat lawatan perniagaan ke Indonesia. Yang arif hakim Mahkamah Tinggi telah mengubah syarat yang dikenakan itu dan memerintahkan passport antarabangsa itu dikembalikan kepada responden untuk masa yang tertentu. Pendakwa raya telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tidaklah menyalahi undang-undang mengenakan syarat yang berpatutan dan munasabah dan khasnya syarat meminta orang yang dituduh menyerah passportnya, supaya memastikan kehadiran kemudiannya di mahkamah.

(2) Di dalam kes ini memandang kepada perintah memindahkan kes itu dari mahkamah sesyen ke Mahkamah Tinggi, yang arif hakim Mahkamah Tinggi telah bertindak di dalam bidangkuasanya menyemak syarat jaminan itu seolah-olah ia dibuat oleh beliau sendiri.

(3) Walaubagaimanapun, oleh kerana tidak ada peruntukan jelas sebaliknya di Kanun Acara Jenayah, hakim Mahkamah Tinggi boleh di bawah s 4 Kanun itu, menjalankan kuasa penyemakannya di bawah Akta Mahkamah Kehakiman 1964.]

Cases referred to

1 *Rex* v *Genda Singh & Ors* AIR 1950 All 525 (folld)
2 *Hazari Lal Gupta* v *Rameshwar Prasad & Anor* AIR 1972 SC 484 (folld)
3 *Varadaraja Mavalliar* (1957) 1 Mad LJ (Crim) 717 (folld)
4 *Re Kota Appalakonda* AIR 1942 Mal 749 (folld)
5 *Government of Malaysia & Ors* v *Loh Wai Kong* [1979] 2 MLJ 33 (refd)
6 *PP* v *Zulkiflee bin Hassan* [1990] 2 MLJ 215 (folld)
7 *Hidayat Ullah* v *The Crown* 50 Cr LJ 1949 (folld)
8 *Re Saradamma* AIR 1965 AP 444 (folld)
9 *Liew Kwai Wah & Anor* v *PP* [1987] 2 MLJ 69 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 4, 388, 389, 394, 418A
Courts of Judicature Act 1964 s 35

Appeal from: Federal Territory Criminal Appeal No 44-19-1990 (High Court, Kuala Lumpur)

Ronald Khoo (*Harjeet Singh* with him) for the appellant.
Stanley Isaac (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Wan Yahya J (delivering the judgment of the court): On 18 June 1990 the respondent was produced and charged before the sessions court Kuala Lumpur in respect of a non-bailable offence punishable under s 409 of the Penal Code. The learned sessions judge allowed the respondent to be released on his entering into a bail bond in the sum of $400,000 in two sureties and on condition that he would surrender his international passport to the court. On the same day the deputy public prosecutor acting under the proviso to s 418A Criminal Procedure Code applied for and obtained the order for the case to be transferred to the High Court, Kuala Lumpur. On 13 September 1990 the respondent, who considered it imperative that he should make a compelling business trip to Jakarta, filed a notice of motion in the High Court seeking for an order for the release of his international passport. Shaik Daud J after hearing both parties, varied the condition imposed by the sessions judge and ordered that the international passport be returned to the respondent for the purpose of a specific five-day trip to Jakarta only and that the same be surrendered to the court within 48 hours of the respondent's arrival in this country. [See [1991] 2 MLJ 125.]

The public prosecutor appealed against the order. It is the appellant's contention that the implied power to impose conditions for the surrender of the respondent's passport under s 388 of the Criminal Procedure Code is not variable by the High Court either under s 389 of the same Code or in the exercise of its inherent power, but it has to be by way of an appeal under s 394 of that Code.

It may be helpful at this juncture to ascertain briefly the nature and implication of this frequently exercised practice of our courts to order an accused person to enjoin to the bail offered by the court a condition that he surrenders his international passport.

The law relating to bail is set out in Chapter XXXV of the Criminal Procedure Code. Section 387 sets out the right of an accused or arrested person to bail in bailable offence. Section 388 provides for the circumstances where a police officer or the court may exercise its discretion to release on bail any person accused of a non-bailable offence. Both sections do not have any specific provision for the imposition of conditions. However, Indian authorities seem to favour the view that when discretion is given to the court to refuse or grant bail, that discretion in itself implies a discretion to grant bail subject to certain conditions. But, when there is no discretion to refuse bail, the question of imposing conditions does not arise — *Rex* v *Genda Singh & Ors*.[1] Thus conditions can be included in a bail bond issued pursuant to s 388 but not to s 387 as the latter section gives no discretion to the officer or court to withold bail when the person arrested is prepared to provide such bail. Similarly in *Hazari Lal Gupta* v *Rameshwar Prasad & Anor*,[2] it was held that the High Court while granting bail can lay down a condition restricting the accused person's departure from India by requiring him to surrender his passport. Several earlier Indian authorities had expressed the same view on this matter. In *Varadaraja Mavalliar*,[3] the Madras High Court reviewing the case law on this subject held that in non-bailable offences, the court can impose restriction in suitable cases. In *Re Kota Appalakonda*[4] the court in holding that condition made under s 496 of the Indian Criminal Procedure Code to be invalid made the following observation on the scope of s 497:

> With regard to non-bailable offences, I can see no objection to imposing conditions of this kind; for the magistrate has an option to grant bail or to refuse bail and he has also the power under s 497(5) of the Criminal Procedure Code of causing persons so released to be arrested and committed to custody, which subsection he would apply in case the condition was not fulfilled.

The provisions of s 496, s 497 and s 498 of the former Indian Criminal Procedure Code correspond with s 387, s 388 and s 389 respectively of our Criminal Procedure Code and for the same reasons as expressed in the aforementioned case, we would agree that analogous fair and reasonable conditions apropos to the securing of the accused's subsequent attendence in court are not illegal and therefore imposable by our courts. In fact, although no ruling was made in the Federal Court's decision in *Government of Malaysia & Ors* v *Loh Wai Kong*[5] and the Supreme Court's decision in *PP* v *Zulkiflee bin Hassan*[6] the facts in both cases clearly indicate

that the condition for the surrender of passport was not disapproved of by the court.

Having decided on the legality to impose the condition and in particular the condition requiring the accused to surrender his passport, we next proceed to consider the question whether the subordinate and the High Court has the power to alter or remove it. Section 388(5) of the Criminal Procedure Code empowers the court which granted the bail the power to cancel it. The power to admit, refuse or cancel bail must necessarily imply the power to vary or alter the same. In the present case in view of the order made for its transfer from the sessions court to the High Court, the learned judge was acting well within his jurisdiction to review the condition of bail as if the same was made by him.

Section 389 of our Criminal Procedure Code which is relevant to this issue reads:

> The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or court be reduced or increased.

This section is intended to supplement the provision on s 388. The first part of the section contains a directive to the police officer or the court before which the accused is produced in the first instance, that the amount of bail should be reasonably sufficient to secure the attendance of the person arrested and this amount should not be excessive. The second part confers on the judge (i) the power to direct in any case, whether there be an appeal or not on conviction, that any person be admitted to bail and (ii) the power to direct that the bail required by a police officer or the court be reduced or increased. In *Hidayat Ullah* v *The Crown*[7] the full Bench of the Lahore High Court opined that the use of the expression, 'The High Court, may in any case, direct that any person be admitted to bail' clearly shows that s 498 (corresponding to our s 389) is intended to supplement and complete the provision of s 497 (our s 388) and s 498 (our s 389) and justifies the belief that the power given includes a power to revise the exercise of discretion by police officer and court of first instance.

We agree with the above authorities and we would reiterate what was said earlier in *PP* v *Zulkifflee bin Hassan*[6] that the High Court has an unfettered judicious discretion in dealing with an application under s 389.

The appellant now contends that such discretion must be confined to the variation on the amount and not the condition of the bail such as the temporary release of the passport.

As discussed earlier there is no expressed authority in our Criminal Procedure Code providing for conditions to be included in any bail. The practice to do so however had gained judicial recognition in the courts in both India and Malaysia on the rationale that such condition would provide an adjunctive or supplemental security towards ensuring the attendance of the arrested person at his subsequent trial. No person can be admitted to bail under s 388 or s 389 purely on his undertaking to abide by some conditions alone without binding himself to forfeit a certain sum in the event of his default, but a person may be released on bail without any condition attached to it. Such condition therefore, to our mind, is not the principal but only a complementary security to be applied concomitantly with the amount prescribed in the bail bond. Such condition in the bail bond would have a persuasive effect of reducing a larger amount of bail which would have been otherwise required by the court. To put it in another way — a court may require a certain large amount to be deposited in respect of a non bailable offence but would be willing to reduce it to a lesser sum on the undertaking of the detained person to surrender his passport.

The amount of money in the bail bond and not the condition form the prerequisite to the release of an arrested person on bail. Therefore s 388 makes no mention of any condition, and it follows that such a provision does not appear in s 389. The reason is obvious — the legislature could not have made a provision for the alteration or variation of something which it did not create or was not at that time in existence.

As against this proposition Mr Deputy came up with the argument that s 394 would apply and the respondent should have procured his remedy by way of appeal only.

Section 394 reads :

> Any person aggrieved by *any order* or *refusal* of any inferior Court made under this Chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.

We are unable to accept that by the expression 'any order or refusal' Parliament had intended these words to refer exclusively to the condition such as the surrendering of passport made under s 388 or s 389 when no provision for any condition was made or contemplated by the legislature in the first instance.

The intervening power of the High Court in modifying the lower court's order in this aspect is not entirely without precedents. In *Re Saradamma*,[8] the court invoked the concurrent jurisdiction of the High Court under s 497 of the former Indian Criminal Procedure Code (our s 388) to alter a subordinate court's order affecting the residential conditions in the bail bond. When considering whether the conditions were fair and reasonable Venkatesam J said:

...The petitioners are citizens of Mysore state and the trial is to take place before the sessions judge, Cuddapah. According to the condition imposed, they have to reside in the Cuddapah town, which I am told is more than 200 miles away from their native villages. It is undeniable that it is a matter of great hardship to the accused to comply with that condition. But having regard to the facts of this case referred to above, some condition must be imposed in order to secure the presence of the accused on the due dates of trial, and for an expeditious disposal of the case. In this view, I modify the terms imposed by the learned sessions judge as follows:

All the petitioners in both the cases will report to the police at Cuddapah the time of their departure from Cuddapah town, and report themselves to their respective police stations.

In any event, in the absence of any express provision in the Criminal Procedure Code to the contrary a judge of a High Court may by virtue of s 4 of the Code exercise his revisionary power under the Courts of Judicature Act 1964, s 35 of which reads :

In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

The term 'In addition to the powers conferred on the High Court by this or any other written law ...' must refer to other additional supervisory or revisional powers over and above those powers which are already contained in the Courts of Judicature Act 1964 itself as well as in any other written law such as the power conferred by the Criminal Procedure Code.

The object and duty of the High Court in exercising the discretion has been dealt with by Abdul Hamid CJ (as he then was) in the Supreme Court case of *Liew Kwai Wah & Anor* v *PP*[9] and in particular at p 70 where the learned CJ said:

The principles which should guide the courts in the exercise of the revisionary powers have been clearly set out by Jenkins CJ in *Emperor* v *Lachiram*. In that case his Lordship said that 'this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.'

Although the purpose of remanding an accused person is never intended to serve as his pre-trial punishment, the outcome of such detention can often be misconstrued as an oppressive privation of his personal liberty especially so when at the end of a prolonged detention and trial the person detained is found to be not guilty. The court has always leaned in favour of admitting an accused person to bail. Various conditions and circumstances are considered in granting bail and these must necessarily vary from time to time. Subsequent deterioration in the health of a remanded person, the prospects of a serious illness or bereavement of a close relative, an unduly delayed trial, or consequent evidence lending to establishing the accused's innocence are some of the changing circumstances which may affect a person's discretionary right to bail. For that reason several ingresses to bail have been provided by statute which gives the option to an accused person to either go before the same court or apply to a higher court for reconsideration or variation of his bail. It is for him to proceed by whichever avenue that may appear to be more expeditious or practical in the circumstances. Moreover, the appellate remedy under s 394 of the Criminal Procedure Code, as suggested by Mr Deputy, is neither a simple or a speedy procedure and is certainly not the best option available in an exigent situation facing an arrested person.

If the High Court is to fulfil its supervisory role in providing a speedy and efficacious redress of any injustice arising out of a person's pre-trial detention, then it must be given an unimpeded discretion to intervene and if circumstance so require to vary any unjust subordinate court order in respect of the amount or conditions set out in any bail bond.

In view of the above findings, we do not consider it necessary to deal with the principle governing the alternative application of inherent power alluded to in the learned judge's written decision. We accordingly dismiss the appeal.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*